

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE: CATHODE RAY TUBE (CRT)
ANTITRUST LITIGATION

MDL No. 1917

Case No. C-07-5944 JST

This Order Relates To:

**ORDER DENYING MOTION TO
COMPEL**

ALL DIRECT PURCHASER PLAINTIFFS

Re: ECF No. 5266

Before the Court is the Direct Purchaser Plaintiffs (“DPPs”)’ motion to compel Irico Group Corp. and Irico Display Devices Co., Ltd. (collectively, “the Irico Defendants”) to respond to five discovery requests filed in 2010 and 2011. ECF No. 5266. The Court will deny the motion.

The Court set aside the Irico Defendants’ default on February 1, 2018. ECF No. 5240. In its order, the Court found that the Irico Defendants had not shown immunity from suit under the Foreign Sovereign Immunities Act. *Id.* at 14. The Court also found, however, that even though the defense had not been established, “the Irico Defendants have raised potential meritorious defenses as to both Group and Display,” *id.* at 18, and that “[t]he Irico Defendants have raised significant doubt as to whether the Court has jurisdiction under the FSIA as to Irico Group,” *id.* at 17. The Court therefore set aside the defaults entered against the Irico Defendants, reopened the case, and ordered that “the DPPs are [now] free to undertake jurisdictional discovery.” *Id.* at 20.

Following entry of that order, the DPPs served both jurisdictional and merits discovery on the Irico Defendants. The Irico Defendants responded to the jurisdictional discovery, and the parties’ meet-and-confer efforts concerning that discovery are now underway. *See* ECF Nos. 5272-2, 3, 4. With regard to the merits discovery, however, the Irico Defendants refused to respond at all. They argued that such discovery was not appropriate until the question of the Court’s jurisdiction had been

1 resolved.

2 The DPPs then filed a motion to compel responses to the merits discovery before Special
3 Master Vaughn R. Walker. ECF No. 5264. Special Master Walker declined to rule on the motion,
4 asking that this Court provide guidance regarding whether merits discovery could proceed at all.
5 *Id.*

6 The Court now denies the DPP's motion to compel. Where, as here, there is a substantial
7 question regarding a defendant's immunity from suit under the Foreign Sovereign Immunities Act,
8 the parties should conduct jurisdictional discovery promptly before addressing the merits.
9 *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1324
10 (2017). The Supreme Court has instructed that "a court should decide the foreign sovereign's
11 immunity defense at the threshold of the action. . . . If a decision about the matter requires
12 resolution of factual disputes, the court will have to resolve those disputes, but it should do so as
13 near to the outset of the case as is reasonably possible." *Id.* (citing *Verlinden B.V. v. Cent. Bank of*
14 *Nigeria*, 461 U.S. 480, 493 (1983)) (internal citations omitted). There are good policy reasons for
15 this rule, chiefly among them that the Court's jurisdiction over the Irico Defendants remains
16 unsettled. Accordingly, "discovery against a foreign sovereign should be ordered circumspectly
17 and only to verify allegations of specific facts crucial to the immunity determination." *Af-Cap,*
18 *Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1096 (9th Cir. 2007) (citing *Connecticut*
19 *Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 261 n.10 (5th Cir. 2002), *as amended on*
20 *denial of reh'g* (Aug. 29, 2002)). At this stage of the case, only jurisdictional discovery is
21 appropriate.

22 The Court makes two more observations to guide the parties going forward. First, the
23 Court rejects the DPPs' argument that the Irico Defendants have waived all objections to any
24 discovery that was propounded earlier in the case. Ordinarily, any objections would have been
25 waived by the Irico Defendants' failure to respond, but the Court finds good cause to excuse their
26 failure. *Landon v. Ernst & Young LLP*, No. C08-02853 JF (HRL), 2009 WL 4723708, at *1 (N.D.
27 Cal. Dec. 2, 2009). "In determining whether a party has good cause, the court will consider
28 factors such as the length of the delay, the reason for the delay, bad faith, prejudice to the

1 propounding party, the appropriateness of the requests, and whether waiver would result in an
2 ‘excessively harsh result.’” *Id.* (quoting *Hall v. Sullivan*, 231 F.R.D. 468, 474 (D. Md. 2005)).
3 Having set aside these defendants’ defaults so the case could be litigated, it would be “excessively
4 harsh” to now hold that the Irico Defendants must respond to Plaintiffs’ discovery, no matter how
5 broad or burdensome, without objection.

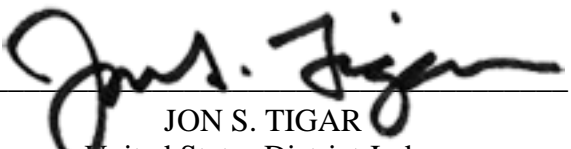
6 Second, while the Court need not reach the Irico Defendants’ burden objection in light of
7 its other rulings, it notes that the objection as currently framed would fail. Simply saying that
8 discovery is burdensome is not enough; a burden objection requires a showing of *actual* burden.
9 The kind of information that might support such a finding includes, for example, an estimate of
10 the amount of time or money that would be spent responding to the challenged discovery, a
11 description of the locations where the information at issue is stored, the numbers of persons who
12 know the information, and/or the amount of information that would have to be located and
13 reviewed, among other factors. *Pham v. Wal-Mart Stores, Inc.*, No. 2:11-CV-01148-KJD, 2011
14 WL 5508832, at *3 (D. Nev. Nov. 9, 2011) (“In order to satisfy this burden, the objecting party
15 must provide sufficient detail regarding the time, money and procedures required to produce the
16 requested documents.”).

17 CONCLUSION

18 The DPPs’ motion to compel is denied. The parties are ordered to submit a jointly
19 proposed schedule or competing proposed schedules for the completion of jurisdictional discovery
20 and briefing by May 1, 2018 at 5:00 p.m. Pacific Time as discussed at yesterday’s hearing.

21 **IT IS SO ORDERED.**

22 Dated: April 25, 2018

23 
24 JON S. TIGAR
25 United States District Judge
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